SUPREME COURT, U.S.
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No. 00-1497

In the Supreme Court of the United States

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 1985, the district court found that petitioner had intentionally segregated its public housing on the basis of race. Since then, the district court has adopted several race-neutral plans designed to remedy the continuing effects of that discrimination. Each time the existing plan was modified, the court found that petitioner had actively or passively resisted implementation of that plan, and that additional measures were required. The question presented is whether, in light of the district court's most recent finding that the existing plan was not achieving the goal of eliminating the continuing effects of petitioner's discrimination, the court erred in modifying that plan to include a limited, race-conscious remedial provision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, cert. granted, No. 00-730 (Mar. 26, 2001)	18-19
Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995)	8, 11, 12
Alexander v. *Estepp*, 95 F.3d 312 (4th Cir. 1996), cert. denied, 520 U.S. 1165 (1997)	18
Birmingham Reverse Discrimination Employment Litigation, In re, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995)	14
Engineering Contractors Ass'n v. *Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998)	18
Freeman v. *Pitts*, 503 U.S. 467 (1992)	12
Hayes v. *North State Law Enforcement Ass'n*, 10 F.3d 207 (4th Cir. 1993)	18
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)	6, 11, 12
Schurr v. *Resorts Int'l Hotel*, 196 F.3d 486 (3d Cir. 1999)	13-14
Spallone v. *United States*, 493 U.S. 265 (1990)	12
United States v. *Paradise*, 480 U.S. 149 (1987)	8, 9, 10

Cases—Continued: Page

United States v. *Yonkers Bd. of Educ.*:
837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) 2, 9, 12
927 F.2d 85 (2d Cir.), cert. denied, 502 U.S. 816 (1991) 2
29 F.3d 40 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995) 4
624 F. Supp. 1276 (S.D.N.Y. 1985) 2, 8, 12

Constitution and statute:
U.S. Const. Amend. XIV 2
Fair Housing Act, 42 U.S.C. 3601 *et seq.* 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 239 F.3d 211. The district court's remedial order (Pet. App. 23a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2001. The petition for a writ of certiorari was filed on March 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

The lengthy procedural history of this case is marked by petitioner's repeated failure to comply with court-ordered plans designed to redress the continuing

effects of petitioner's past racial discrimination in public housing.

1. Following a lengthy trial in 1983 and 1984, the district court found that petitioner had intentionally segregated its public and subsidized housing on the basis of race in violation of the Fourteenth Amendment and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). The court found that petitioner had intentionally relegated virtually all public housing to the southwest part of the City of Yonkers, which is primarily inhabited by minorities. To remedy that violation—which petitioner "does not take issue with" here (Pet. 21)—the court entered a Housing Remedy Order (HRO) that enjoined petitioner from taking any action that would further racial segregation in public or subsidized housing within Yonkers and ordered the development of a long-term plan to create additional subsidized housing in the east and northwest part of Yonkers. Pet. App. 109a-112a. That plan was affirmed. *Yonkers Bd. of Educ.*, 837 F.2d at 1184, 1236.

In January 1988, the parties negotiated a consent decree, pursuant to which petitioner agreed to create 800 units of subsidized housing by 1992 to fulfill its obligations under the long-term plan. Pet. App. 125a. Almost immediately, however, petitioner sought to avoid compliance with the HRO and the consent decree. *Id.* at 5a.[1] In June 1988, the district court entered a

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[1] Petitioner appealed the consent decree, and the court of appeals held that terms of the decree prohibited petitioner from seeking further appellate review of its obligation to provide public housing. *United States* v. *Yonkers Bd. of Educ.*, 927 F.2d 85 (2d Cir.), cert. denied, 502 U.S. 816 (1991).

Long Term Plan Order (LTPO), setting forth the specific steps that petitioner was required to take in implementing the HRO. *Id.* at 133a-150a. The LTPO directed petitioner to ensure that subsidized housing was dispersed in a manner that avoided "undue concentration of both public and assisted units in any neighborhood of Yonkers," *id.* at 136a, and created the following system for prioritizing persons eligible for assisted housing:

> Priority 1—persons who had been residents of public or subsidized housing in the City of Yonkers between January 1, 1971 and the date at which assisted housing under the LTPO was made available;
>
> Priority 2—residents of the City of Yonkers;
>
> Priority 3—persons employed in the City of Yonkers.

Id. at 6a, 140a. Under the terms of the LTPO, petitioner may earn housing credits toward obtaining the goals of the HRO and consent decree by placing individuals in affordable units in accordance with the foregoing priority scheme. *Id.* at 126a-127a, 147a.

Petitioner again "failed to implement the terms of the remedial order." Pet. App. 6a. At the district court's invitation, petitioner proposed an alternative long-term plan. *Id.* at 155a. The court granted petitioner's request for a lengthy trial-period to demonstrate the feasibility of its proposal, and held hearings on petitioner's plan in June and July of 1993. *Id.* at 156a-157a. In October 1993, the court entered a Supplemental Long Term Plan Order (SLTPO) that required petitioner to provide 250 subsidized housing units from existing housing, and the remaining housing units from

new construction. *Id.* at 159a-166a. Petitioner appealed and the court of appeals affirmed, observing that the district court gave petitioner ample opportunity to develop a feasible plan, and that "[t]he remedial phase of this litigation has now dragged on for eight years, producing few tangible results." *United States* v. *Yonkers Bd. of Educ.*, 29 F.3d 40, 42 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995).

Petitioner "continued to fail to provide the new subsidized housing [that] the SLTPO contemplated." Pet. App. 6a. As a result, in November 1996, the district court entered a Second Supplemental Long Term Plan Order (Second SLTPO) that required petitioner to provide 100 units of affordable housing to LTPO qualified individuals each year for six years. *Id.* at 179a. In addition, the Second SLTPO ordered that existing housing units that are part of the affordable housing program be located in a community that "furthers the integrative purposes of the LTPO." *Id.* at 181a. The court reserved the right to "modify [the Second SLTPO] *sua sponte* or on request of any party at any time in the event that it shall be shown, after a hearing, that the goals set forth [in the order] have not been realized and are not likely to be realized in the foreseeable future, absent such modification." *Id.* at 185a; see *id.* at 7a.

In 1997 and 1998, the parties disputed the number of housing units for which petitioner was entitled to credit towards the Second SLTPO's goal of 100 units of subsidized housing per year. Pet. App. 7a. Respondents expressed concern that few Priority 1 households were benefitting from petitioner's housing program. *Id.* at 189a-214a. The district court asked the parties to propose a revision to the HRO "to increase the ability of priority 1 class members to have greater housing

opportunity" and "more carefully define what is meant by furthering the integrative purposes of the order." *Id.* at 218a, 223a. The court also ordered that any further affordable housing transactions be subject to review by the Department of Justice for "an evaluation of whether the transaction is consistent with the Court's prior orders and entails an appropriate expenditure of federal funds." *Id.* at 232a-233a.

In September 1999, the district court held another hearing on the status of petitioner's housing program. Pet. App. 372a. The court heard evidence on the number of Priority 1 households that have participated in the program, and the extent to which the targeted integration under the long-term plan has been achieved. *Id.* at 372a-408a. The court found that the program's "accomplishments to date fall far short," and ordered that "no future credits will be granted unless the housing opportunities created further the integrative goals which are the essence of all of the court's prior housing remedy orders, intending to counter the effects of prior racial discrimination in housing." *Id.* at 377a, 383a. The court further determined that "revisions" to the housing remedy were necessary to "accelerate both the volume and the direction and emphasis of future efforts." *Id.* at 377a.

2. In December 1999, the district court entered a Third Supplemental Long Term Plan Order (Third SLTPO). Pet. App. 23a-31a, 32a-33a. Pursuant to that order, the court granted petitioner nearly all the credits that it had requested in 1998 (Year 2). *Id.* at 26a. The court determined, however, that "no future credits will be granted unless housing opportunities created by the existing housing program further the racially integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects

of prior racial discrimination in housing in Yonkers." *Id.* at 27a. The court further ordered that future credits would be granted for the creation of affordable housing opportunities only as follows:

> (a) For Priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population which together totaled less than 45%;
>
> (b) For minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;
>
> (c) For non-minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a White population of less than 45%.

Id. at 28a. In addition, the court instituted a bonus system pursuant to which petitioner may receive enhanced credits for the placement of Priority 1 households. *Id.* at 28a-29a; see *id.* at 8a-9a.

3. The court of appeals affirmed. Pet. App. 1a-22a. Applying the framework established by this Court in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court of appeals rejected petitioner's argument that the district court improperly modified the Second SLTPO, finding that the adoption of the Third SLTPO was supported by a significant change in the factual conditions underlying the Second SLTPO, namely, the fact that the Second SLTPO was not working. Pet. App. 12a-13a. As the court explained, the "[Second] SLTPO was adopted to promote the implementation of the HRO and thereby to further the ultimate goal of remedying the City's past intentional

racial discrimination in its public and subsidized housing." *Id.* at 13a. And, the court concluded, by the time of the Third SLTPO, "it had become manifest that neither the intermediate nor the ultimate goal of the [Second] SLTPO was being achieved." *Ibid.*

To support that conclusion, the court of appeals reviewed the evidence presented to the district court showing that in Years 2 and 3 of petitioner's affordable housing program, few Priority 1 households were afforded housing opportunities. As the court recounted, "[i]n 1997, only 29% of * * * beneficiaries were priority one households, 68% were priority two, and 3% were priority three; and in 1998, only 7.9% were priority one, 85.4% were priority two, and 6.7% were priority three." Pet. App. 13a. In addition, the court reviewed the evidence showing that petitioner's actions under the Second SLTPO "were similarly inadequate in achieving the 'integrative goals which underlie the entire remedy order.'" *Ibid.*; see *id.* at 14a ("The[] data [presented to the district court] reveal that more than two years after its adoption, roughly half of those housing allocations made under the [Second] SLTPO whose effects on the racial segregation of Yonkers public housing are known remain non-integrative.").

The court of appeals also rejected petitioner's argument that, "by conditioning [petitioner's] receipt of credits for housing priority two and three families on the race of the families and on the racial makeup of the neighborhoods in which they are housed," the Third SLTPO "employs a race-conscious remedy in violation of the Equal Protection Clause." Pet. App. 15a. In considering that claim, the court stated that there is some question as to whether a court's consideration of race to remedy a finding of intentional racial discrimination triggers strict scrutiny. *Id.* at 15a-16a. But the

court concluded that it was unnecessary to "reach this question," because "the remedy embodied in the [Third] SLTPO clearly survives even strict scrutiny." *Id.* at 16a.

The court explained that to "pass strict scrutiny, a race-conscious remedy must be narrowly tailored to further a compelling government interest," and that the court reviews de novo "[a] district court's determination that a race-conscious remedy is narrowly tailored to advance a compelling government interest." Pet. App. 16a-17a & n.12 (citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995)). The court concluded that there was "no doubt" that the district court had a compelling interest for adopting a race-conscious remedy based on the "express[]" findings made in this litigation that "[petitioner] has engaged in intentional racial discrimination in its subsidized housing program." *Id.* at 17a (citing *Yonkers Bd. of Educ.*, 624 F. Supp. at 1288-1376). Thus, the court focused on "whether the district court's race-conscious remedy is narrowly tailored to further this unquestionably compelling interest." *Ibid.*

In determining whether the Third SLTPO's "race-conscious remedy is narrowly tailored to the ends it serves," the court considered the factors discussed in *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion). Pet. App. 17a.[2] First, the court concluded that the "necessity of relief in the case at bar

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[2] In *Paradise*, a plurality observed that the Court "look[s] to several factors" in "determining whether race-conscious remedies are appropriate, * * * including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief * * *; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." 480 U.S. at 171; see Pet. App. 19a.

is patent." *Ibid.* As the court recounted, "[i]n spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes * * *, and at least partly because of the active and passive resistance to integration displayed by the City * * *, Yonkers public housing remains substantially segregated even today." *Id.* at 18a. Moreover, the court added, before adopting the challenged remedy, the district court "expressly" found that "the experience [of race neutral remedies] has not been satisfactory." *Ibid.* The court also observed that, as long as a district court stays "within appropriate constitutional or statutory limits," the court must be cognizant of the district court's superior vantage point, based on its "first-hand experience with the parties," to calibrate "the remedy best suited to curing" a constitutional violation. *Ibid.* (quoting *Yonkers Bd. of Educ.*, 837 F.2d at 1236, and *Paradise*, 480 U.S. at 184).

Second, the court concluded that the Third SLTPO "is both 'flexible' and 'ephemeral,'" in that the order "contemplates that the District Court will adjust the terms * * * as needed," and will "remain in force only until the discrete goals of the [Second] SLTPO and of the earlier remedial Orders in this case have been met." Pet. App. 18a-19a. Third, the court found that "the numerical goals and conditions for awarding [petitioner] housing credits adopted by the [Third] SLTPO are not disproportionate to the racial mix of Yonkers residents or the size of the Yonkers housing market." *Id.* at 19a. Fourth, the court determined that the Third SLTPO "does not unduly burden the rights of third

parties." *Ibid.* As the court explained, the order places no limit on the number of nonminority families that may move into subsidized housing in minority neighborhoods, and credits petitioner for creating housing opportunities in nonminority areas to any Priority 1 household regardless of race. *Id.* at 19a-20a.

Finally, the court "acknowledge[d] the respect owed a district court's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." Pet. App. 20a (quoting *Paradise*, 480 U.S. at 183). In that regard, the court noted that the district court adopted the challenged remedy only after it had "carefully and patiently attempted to achieve this end by race-neutral means," "expressly determined that such means were not succeeding," and "hear[d] from both sides to the dispute." *Ibid.* Moreover, the court emphasized that the remedy that the court did adopt was "both temperate and responsible." *Ibid.*[3]

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. The Third SLTPO is a limited attempt to redress the continuing effects of petitioner's past racial discrimination, and was adopted only after several race-neutral remedial plans proved ineffectual. The history of this litigation, including petitioner's repeated failure to comply with the prior remedial orders, makes this case a poor vehicle for addressing any of the broader

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[3] The court of appeals also rejected a cross-appeal by the NAACP challenging the portion of the district court's Third SLTPO that awarded petitioner bonus credits for achieving certain targets for placement of Priority 1 households into affordable housing, finding that the district court did not abuse its discretion in so modifying the Second SLTPO. Pet. App. 21a-22a.

complaints made by petitioner about the current state of the law.

1. Petitioner does not challenge the court of appeals' ruling that the district court acted within its discretion in modifying the long-term plan adopted by the Second SLTPO under the framework established by this Court in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Pet. App. 15a. Petitioner contends (Pet. 14-24), however, that the court did not adequately scrutinize the Third SLTPO in determining whether the adoption of a race-conscious remedy was warranted. That claim is without merit.

To begin with, petitioner fundamentally mischaracterizes (Pet. 16) the analysis engaged in by the court of appeals in reviewing the Third SLTPO, repeatedly stating that the court "deferred to the district court's exercise of equitable discretion." See also Pet. 15 ("[T]he Court of Appeals deferred to the district court's exercise of its 'sound discretion.'"), 16 (The court of appeals "deferred to the district court's exercise of equitable discretion."), 18 (The court of appeals "substantially deferred to the district court's unexplained decision that a race-based remedy was necessary."). As the court of appeals made clear, it undertook "*de novo*" review of the district court's determination that a race-conscious remedy was appropriate, and subjected that remedy to "strict scrutiny." Pet. App. 17a n.12. Furthermore, in applying strict scrutiny, the court of appeals followed this Court's recent decision in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995). Pet. App. 9a, 15a, 16a-17a.

To be sure, the court of appeals also recognized that trial courts have broad authority to remedy constitutional violations, and to fashion and modify remedial decrees. Pet. App. 18a. That proposition is well-

founded. See, *e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 487 (1992); see also *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) (Federal courts have "inherent power to enforce compliance" with their lawful orders, and an order "is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers.") (internal quotation marks omitted); *Rufo*, 502 U.S. at 393-394 (O'Connor, J., concurring in the judgment). But, as petitioner neglects to mention, the court of appeals specifically recognized that that discretion must be exercised "'within appropriate constitutional or statutory limits.'" Pet. App. 18a. Accordingly, in determining whether the district court's adoption of a limited, race-conscious remedy in the Third SLTPO was appropriate, the court of appeals subjected the order to strict scrutiny. *Id.* at 16a-20a.

As the court below recognized, "[t]o pass strict scrutiny, a race-conscious remedy must be narrowly tailored to further a compelling government interest." Pet. App. 16a-17a (citing *Adarand*, 515 U.S. at 227). The court held that the Third SLTPO advanced a compelling government interest, because "[t]he district court expressly found that [petitioner] has engaged in intentional racial discrimination in its subsidized housing program," and the "Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Id.* at 17a (internal quotation marks omitted); see *Adarand*, 515 U.S. at 227. That finding of past intentional racial discrimination is law of this case, Pet. App. 3a-4a; see also *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1288-1376 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988), and petitioner "does not take issue with" it here. Pet. 21.

Petitioner contends (Pet. 20-24) that additional findings were necessary to justify the district court's adoption of a race-conscious remedy in the Third SLTPO. But, before adopting the Third SLTPO, the district court determined—after holding evidentiary hearings on the matter—that the prior intentional segregation has not been cured. Pet. App. 18a; see pp. 4-5, *supra*. Indeed, as the court of appeals observed, "[i]n spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes * * *, and at least partly because of the active and passive resistance to integration displayed by the City (and documented in both this and in our earlier opinions), Yonkers public housing remains substantially segregated even today." *Ibid.*

Furthermore, a necessary predicate for the district court's modification of the Second SLTPO—which petitioner does not challenge here—was a determination that that remedial plan had failed to achieve the goal of integrating racially segregated public housing in Yonkers or eliminating the continuing effects of petitioner's past discrimination. See Pet. App. 13a ("[B]y the time of the modification * * *, it had become manifest that neither the intermediate nor the ultimate goal of the [Second] SLTPO was being achieved."). More fundamentally, the district court adopted the Third SLTPO against the backdrop of the many previous findings in this case of intentional racial discrimination and of the continuing harm or segregation persisting from that discrimination. See Gov't C.A. Br. 18-20, 26 (discussing some of those findings). Those findings remain law of the case.[4]

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[4] Petitioner contends (Pet. 20-21) that the Second Circuit's decision in this case conflicts with *Schurr* v. *Resorts International*

2. Petitioner asserts (Pet. 24-27) that the district court lacked any justification for adopting a race-conscious remedy. As the court of appeals explained, however, the district court adopted the Third SLTPO only after "carefully and patiently" attempting to remedy petitioner's past intentional racial discrimination through "race-neutral means," and "having expressly determined that such means were not succeeding." Pet. App. 20a. The record overwhelmingly supports that conclusion.

The prior remedial orders entered in this case were adopted for the express purpose of "counter[ing] the effects of prior racial discrimination in housing in Yonkers." Pet. App. 27a. The HRO enjoins petitioner from "intentionally promoting racial residential segregation in Yonkers," and created an affordable housing trust fund to support and create housing opportunities to advance integration. *Id.* at 98a, 109a-110a. Racial integration was the principal goal of the LTPO, which provides that the first priority for subsidized housing opportunities outside of predominantly minority southwest Yonkers should be given to individuals who live or

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Hotel, 196 F.3d 486 (3d Cir. 1999), and *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995), insofar as the court of appeals did not require the district court to make additional factual findings. Neither of those cases, however, involved a district court's adoption of a race-conscious remedy as part of its modification of an existing remedial order in a case, such as this one, in which extensive findings of past discrimination and of the failure to redress such discrimination had been made by the same trial court, and become law of the case. *Schurr* considered whether an employer's "affirmative action program" violated Title VII, 196 F.3d at 496; *Birmingham* involved whether an "affirmative action plan" was supported by adequate findings of "past discrimination," 20 F.3d at 1549.

have lived in public housing in the City. *Id.* at 140a. In addition, racial integration was the objective of the Second SLTPO, which states that housing units selected under the affordable housing program must "further[] the integrative purposes of the LTPO." *Id.* at 181a. See Gov't C.A. Br. 23-24.

Before adopting the Third SLTPO, the district court determined that petitioner's housing program was not achieving integration. The district court heard evidence that petitioner's affordable housing program was not benefitting Priority 1 households. During 1997, only 29% of housing placements under petitioner's program involved Priority 1 households, and by 1998 that percentage declined to 7.9%. Pet. App. 13a-14a. Other evidence showed that moves made during Years 2 and 3 of petitioner's program were not achieving the integrative goals of the remedial scheme. Half of the total moves that occurred under petitioner's program during those years consisted of nonminority families moving to predominantly nonminority communities, and of minority families moving to predominantly minority communities. *Ibid.*

The district court went to great lengths to use race-neutral means to remedy the segregation in subsidized housing caused by petitioner's past racial discrimination. The race-conscious provision of the Third SLTPO was adopted only after more than 15 years of failed race-neutral efforts. Pet. App. 18a; see Gov't C.A. Br. 26, 29-30 (discussing evidence showing that petitioner's implementation of the prior remedial plan was not effective).

The Third SLTPO's use of race was also carefully tailored to remedying the continuing effects of petitioner's past discrimination. The evidence showed that southwest Yonkers and the Runyon Heights section of

east Yonkers continue to be overwhelmingly populated by black and Hispanic residents. As the district court found, the segregated conditions in those areas were caused largely by petitioner's unconstitutional efforts to confine housing to those areas. In seeking to redress that segregation, the district court properly required petitioner to enhance its efforts to afford housing opportunities to Priority 1 households—families who resided in public and subsidized housing at the time of petitioner's discriminatory actions, and who are overwhelmingly minority. See Gov't C.A. Br. 32.

3. Petitioner suggests (Pet. 27) that the race-conscious remedy adopted by the Third SLTPO is "extreme." That is incorrect. The race-conscious provision of the Third SLTPO establishes the criteria pursuant to which petitioner may receive "future housing credits" toward compliance with the remedial plan. Pet. App. 8a. As the court of appeals explained, the Third SLTPO, including the challenged provision, is by its terms both "flexible" and "ephemeral" in nature. *Id.* at 18a. The order "contemplates that the District Court will adjust the terms of the Order as needed," and that the order "will remain in force only until the discrete goals of the [Second] SLTPO and of the earlier remedial Orders in this case have been met." *Id.* at 18a-19a.

Contrary to petitioner's contention (Pet. 29), the Third SLTPO does not preclude participation by nonminority families in petitioner's housing program. Nonminority families who are Priority 1 households may participate in that program, and petitioner may receive LTPO credit for placing those families in subsidized housing. Nonminority families that qualify as Priority 2 or 3 households may also participate in petitioner's program, and petitioner may receive credit for

that participation when the moves further integration and result in nonminority families moving into predominantly minority neighborhoods. No qualified family, regardless of race, is prevented from participating in petitioner's housing program, and nothing precludes petitioner from providing subsidized housing opportunities to families whose moves do not further integration. The order merely withholds LTPO credit for moves that do not redress the lingering effect of petitioner's past discrimination. Pet. App. 19a-20a; see Gov't C.A. Br. 33-34.

4. Petitioner's broad complaints about the current state of the law do not merit review. Petitioner claims (Pet. 17) that "further guidance" is needed in "explaining how a lower court should strictly scrutinize a racial remedy," and suggests that the level of scrutiny employed by the court of appeals below is at odds with the approach undertaken by other courts of appeals. That claim is based on petitioner's assertion (*ibid.*) that the Second Circuit held "that the assessment of the necessity for racial relief is a matter left to the 'sound discretion' of the district court." However, that is not the holding of the court of appeals. As explained above, the court below engaged in a "*de novo*" review of whether the "race-conscious remedy [adopted by the Third SLTPO] is narrowly tailored to advance a compelling government interest," and concluded that "the remedy embodied in the [Third] SLTPO clearly survives even strict scrutiny." Pet. App. 16a, 17a n.12. Neither the court of appeals' statement of the strict scrutiny analysis, nor its fact-bound application of that analysis, warrants further review in this case.

Petitioner cites other courts of appeals' decisions for the proposition that race-conscious remedies may only survive strict scrutiny when they are adopted as a "last

resort." Pet. 17 (citing *Engineering Contractors Ass'n* v. *Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998); *Alexander* v. *Estepp*, 95 F.3d 312 (4th Cir. 1996), cert. denied, 520 U.S. 1165 (1997); *Hayes* v. *North State Law Enforcement Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)). This case embodies, rather than conflicts with, that remedial principle. The district court adopted the race-conscious element of the Third SLTPO only after it determined that "fifteen years of remedial efforts encompassing four race-neutral remedial regimes" had failed to redress the underlying constitutional violation. Pet. App. 18a.

In any event, given the unique circumstances of this case—including the district court's repeated attempts to implement race-neutral remedies, and petitioner's repeated resistance to the implementation of those remedies—this case would be a poor vehicle for addressing any of the broader doctrinal issues that petitioner seeks to raise here.[5]

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[5] Petitioner claims (Pet. 24, 27) that the "*Paradise* factors are too vague to provide sufficient guideposts in constructing a racial remedy," and that "further explanation of the *Paradise* factors by this Court is necessary to assist lower courts in assessing a racial remedy." But petitioner does not point to any conflict in the lower courts warranting this Court's review with respect to the consideration of the *Paradise* factors in this case. Moreover, in the court of appeals, petitioner itself argued that the *Paradise* factors are "generally accepted," and urged the court to consider those factors in determining whether the Third SLTPO meets the "narrowly tailored" requirement. Pet. C.A. Br. 52; see also *ibid.* ("Although originally applied to employment-based affirmative action, this test [*i.e.*, the *Paradise* factors] has been consistently applied in assessing whether a remedy is narrowly tailored."). Petitioner has not argued that this case should be held for *Adarand Constructors, Inc.* v. *Mineta*, cert. granted, No. 00-730

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(Mar. 26, 2001). But in any event, we do not believe that course would be appropriate. The question presented in *Adarand* involves the application of the strict scrutiny standard to a statutory and regulatory program, and not to the type of remedial order challenged in this case, which was adopted only following a judicial finding of intentional racial discrimination, and following several failed efforts to address the continuing effects of that discrimination through race-neutral means.